No. 79-1734

DEC 3 19
MICHAEL RODAK, JR

In The

Supreme Court of the United States

October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U. S. C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy requirementes of the Fourteenth Amendment.

3. Whether simple negligence, if proven, may form the basis of a judgment under 42 U. S. C. § 1983.

4. Whether the record supports a finding that either of the petitioners were negligent.

LIST OF PARTIES

The caption of this case contains the names of all parties.

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OPINIONS BELOW

The opinion of District Judge Albert G. Schatz granting the respondent's motion for summary judgment is unreported and appears as Appendix B to the Petition for Writ of Certiorari.

The opinion of the Court of Appeals is also unreported (*See,* 620 F. 2d 307) and appears as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed January 29, 1980. The petitioners' petition for rehearing to the Circuit Court of Appeals was denied on February 29, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). A Writ of Certiorari was granted October 20, 1980.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

3. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976) appears as Appendix E to the Petition for Certiorari.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the District of Nebraska under 42 U. S. C. § 1983 by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while being stored for the prisoner at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert Parratt, Warden of NPCC, and Francis Lugenbill, Hobby Manager at NPCC (J. A. 5). The case was decided upon the plaintiff's Motion for Summary Judgment (J. A. 18).

The hobby materials in question were ordered by the plaintiff and paid for by him in accordance with NPCC procedures (Petition for Certiorari, Appendix A, paragraph 2). When the items arrived at NPCC a receipt was signed for them by two Hobby Center employees, one civilian and one inmate (J. A. 15, answer 7; J. A. 17, answers 4-8). These items were retained at the Hobby Center because at the time of their arrival the plaintiff was in disciplinary segregation and was not permitted hobby materials (Petition for Certiorari, Appendix A, paragraph 4). Neither of the parties who signed the receipts for the property in question were named as defendants (J. A. 5).

When the plaintiff left disciplinary segregation he attempted to claim his property at the Hobby Center but various searches by NPCC personnel failed to locate it (J. A. 17-18, Answers 9-13; Petition for Certiorari, Appendix A). The undisputed value of the property in question was $23.50.

The district court, upon consideration of the record, granted the plaintiff's motion for summary judgment (Petition for Certiorari, Appendix B), specifically finding that "negligence can form the foundation for an action under section 1983."

On appeal the judgment of the district court was summarily affirmed (Petition for Certiorari, Appendix C).

SUMMARY OF ARGUMENT

1. There exist certain *de minimis* levels or values of property which are not entitled to the protection of the Fourteenth Amendment. The value of the property here is $23.50. If that property is *de minimis,* then deprivation of that property does not violate the Fourteenth Amendment and proof of that loss does not create a basis for liability under 42 U. S. C. § 1983.

2. In order to constitute a deprivation of property under the Fourteenth Amendment there must be a governmental "taking" of such property. Such "taking" is inherently an *intentional* act and occurs for a governmental purpose. The loss of property due to the simple negligence of governmental employees is not an inten-

tional act and fulfills no governmental purpose. Thus, such a loss does not violate the Fourteenth Amendment. In the absence of a violation of a right guaranteed the respondent by the Fourteenth Amendment, no basis for liability under 42 U. S. C. § 1983 exists.

3. The Fourteenth Amendment guarantees a citizen "due process" with respect to a property deprivation. It does not guarantee the citizen he will not be deprived of his property. If the state can negligently deprive a person of his property within the meaning of the Fourteenth Amendment, an adequate, state afforded, post-loss remedy should provide the citizen all of the process he is due under that Amendment. The statutes of the State of Nebraska afforded the respondent such a remedy. He was not denied his property without the availability of the process he was due under the law, and thus there is no basis for liability under 42 U. S. C. § 1983.

4. 42 U. S. C. § 1983 was not intended by the Congress to penalize negligent conduct. Its intent was to penalize the knowing malfeasance or nonfeasance of government officials.

In cases concerning 42 U. S. C. § 1983 this Court has consistently allowed to stand Circuit Court decisions which concluded that negligent conduct did not create liability under that statute, while consistently finding in favor of governmental defendants in those cases in which lower courts have attempted to impose liability under a simple negligence standard.

Furthermore, the concept that simple negligence could give rise to a cause of action under 42 U. S. C. § 1983 is

inconsistent with both the "deliberate indifference" standard employed by this Court in *Estelle v. Gamble,* 429 U. S. 97 (1976), and the evaluation of actions which give rise to a qualified immunity for correctional personnel.

5. The record before the lower courts did not establish that either of the petitioners was negligent. Their only duty to the respondent was to take reasonable efforts to protect his property. This they did by creating a system for safeguarding property contained in an inmate's incoming mail. There is no evidence that the system devised was generally defective. There is only evidence that the system failed in this one instance. The petitioners had no personal contact with the property prior to its loss.

To hold the petitioners liable on this record is to require them to function as *insurers* of an inmate's property. No negligent acts were proven.

ARGUMENT

I.

Fourteenth Amendment, Due Process and Inmate Property Loss.

In this case the respondent (a state prisoner) brought a 42 U. S. C. § 1983 (hereinafter § 1983) action against the petitioners (the Warden and a subordinate officer) on allegations that property valued at $23.50 had been lost while being held for him by institutional personnel (none

of whom were defendants below). The district court concluded the respondent had proven a claim based upon the violation of his rights under the Fourteenth Amendment in that he had, by the negligence of the petitioners, been denied his property without due process of law.

In *Baker v. McCollan,* 443 U. S. 137 (1979), this Court stated: "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Id.* at 140. In this instance, the initial question is whether, under these facts, the Fourteenth Amendment's due process clause protects the respondent from the negligent deprivation of his property by state employees.

A. Is Property Valued at $23.50 Entitled to the Protection of the Fourteenth Amendment?

The value of the property here in question is $23.50. This Court has in the past discussed the possibility that there are minimal limits to the value of property to be afforded due process protection. *Fuentes v. Shevin,* 407 U. S. 67, 90, n. 21 (1972); and *Sniadach v. Family Finance Corporation of Bay View,* 395 U. S. 337, 342 (1969) (Harlan, J., concurring). Establishing an arbitrary limit to the amount which must be in controversy before a § 1983 claim for loss of property without due process of law would provide this Court a mechanism to stem, to a limited extent, the tide of state prisoner § 1983 litigation flowing into the federal courts. *See, Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976); *Howard v. Swenson,* 426 F. 2d 227 (8th Cir. 1976) *cert. denied,* 400 U. S. 948. Where or whether that line should be drawn presents a difficult question which only this Court may resolve, par-

ticularly in view of Mr. Justice Harlan's conclusion that the loss of the "use" of approximately $31.00 is not *de minimus*. *Sniadach v. Family Finance Corp., supra. See also,* Abdalian and Lachman, *Federal Court and Small Claims: Prisoners' § 1983 Actions and § 1983,* 33 Ark. L. Rev. 90 (1979).

B. Is a State Prisoner Provided Process Adequate Under the Fourteenth Amendment Where the State Affords Him a Remedy to Redress the Loss of Property Caused by the Negligence of Its Agents?

1.

In this case we initially question whether property loss occasioned by the negligent conduct of a state employee even falls within the concept of a "taking" as contemplated by the Fifth and Fourteenth Amendments. In essence, we believe that the constitution contemplates a "taking" as an *intentional* governmental act and not negligence. "Before a taking can be established, it must be clear that there was an *intent* by the defendant to take private property." (Emphasis added.) *Sun Oil Co. v. United States,* 577 F. 2d 786, 818 (Ct. Cl. 1978). *See also, Foster v. United States,* 607 F. 2d 943, 950 (Ct. Cl. 1979). A loss of property occasioned by simple negligence is not an intentional act and therefore should not be considered the type of "taking" to which the Constitution attaches the requirement of due process.

In other important respects a negligently caused loss of property does not fall within standard concepts of a governmental taking.

> The Fifth Amendment's guarantee that private property shall not be taken *for a public use* without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U. S. 40, 49 (1960) (Emphasis added). The property in question here was not taken by governmental agents. The current possessors of the property in question, and the purpose to which it has been put, remains a mystery. What is clear is that the property was not taken intentionally or "for a public use." "It is true that not every destruction or injury of property by governmental action has been held to be a 'taking' in the constitutional sense." *Id.* at 48. The respondent here attempts to accomplish exactly the same result under the Fourteenth Amendment that the respondent in *Paul v. Davis,* 424 U. S. 693 (1976), sought unsuccessfully to do.

> [The respondent] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Id. at 701. (Emphasis added.)

2.

Assuming for the moment, however, that negligently lost property has been "taken" by the state within the meaning of the Fourteenth Amendment, what process is due the citizen for such loss? Obviously, the citizen can-

not be provided due process *prior* to a loss occasioned by negligence. If no opportunity exists to provide due process prior to the loss, one must determine whether the provisions of the Amendment have at that point already been abridged or whether affording the citizen subsequent process will satisfy its requirements.

In *Arnett v. Kennedy,* 416 U. S. 134 (1974), the Court considered the due process entitlements under the Fifth Amendment of a federal employee dismissed from his position. The plaintiff claimed that he should be entitled to a full due process hearing *prior* to his discharge rather than being afforded a full due process hearing subsequently. This Court held, "[A] hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Id.* at 157.

In this case, there could be no *pre*-loss hearing and Neb. Rev. Stat. §§ 81-8,209, et seq. (Reissue 1976), (Petition for Writ of Certiorari, Appendix E) provided the respondent an adequate post-loss process by which to seek redress. However, as did the appellee in *Arnett v. Kennedy, Id.,* the respondent chose not to avail himself of the process afforded him. He should be afforded no greater relief.

As Mr. Justice White discussed in the opinion he filed in *Arnett v. Kennedy, Id.* at 171-203, the Court has repeatedly upheld, under due process challenge, procedures which provide a citizen an opportunity, *after* the loss is suffered, to seek redress.

> This basic principle has unwaveringly been applied when private property has been taken by the

> State. A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean,* 234 U. S. 385, 394 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U. S. 545, 552 (1965). Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co. v. Chicago,* 211 U. S. 306 (1908) (seizure of food unfit for consumption); *Central Trust Co. v. Garvan,* 254 U. S. 554 (1921) (seizure of property under Trading with the Enemy Act); *Corn Exchange Bank v. Coler,* 280 U. S. 218 (1930) (seizure of assets of an absconding husband); *Phillips v. Commissioner,* 283 U. S. 589 (1931) (collection of a tax); *Bowles v. Willingham,* 321 U. S. 503 (1944) (setting of price regulations); *Fahey v. Mallonee,* 332 U. S. 245 (1947) (appointment of conservator of assets of savings and loan association); *Ewing v. Mytinger & Casselberry,* 339 U. S. 594 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

Id. at 178-179). The Nebraska tort claims procedure provided the respondent exactly that type of opportunity.

In *Ingraham v. Wright,* 430 U. S. 651 (1977), this Court faced the question of what process was required where corporal punishment in the public schools was involved. This Court concluded that the Fourteenth Amendment did not require notice and hearing prior to the imposition of punishment. More applicable to this case, however, is the following: "When only an invasion of a property interest is involved, there is a greater likeli-

hood that a damages award will make a person completely whole . . . In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires." *Id.* at 701 (Stevens, J., dissenting).

If a state-afforded, post-loss process is available to a prisoner who has suffered a property loss due to the negligence of a state employee, and if that process otherwise comports with due process requirements, then the prisoner is afforded his Fourteenth Amendment rights by virtue of the existence of that process. If afforded the process due him under the Fourteenth Amendment, the prisoner's rights have not been abridged and no basis for a cause of action exists under § 1983.[1]

This position should not be confused with a requirement that state administrative remedies must be exhausted prior to filing a § 1983 action. Not only is this concept directly contrary to the long standing proposition that § 1983 litigants cannot be required to exhaust state remedies, *Monroe v. Pape,* 365 U. S. 167, 187 (1961), but ignores the fact that a person is only entitled to due process once for one loss. If the state can provide a system which meets the requirements of the Fourteenth Amendment and afford possible redress where property

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1 When faced with a factual situation almost identical to the present case, the conclusion that a state tort remedy prevented a Fourteenth Amendment violation was the first alternative for resolution employed in *Bonner v. Coughlin,* 517 F. 2d 1311 (7th Cir. 1975) *mod. en banc* 545 F. 2d 565, *cert. denied,* 435 U. S. 932. The en banc decision subsequently rejected the prisoner's cause of action on the alternative ground that negligence does not state a cause of action under § 1983.

has been lost due to the negligent acts of a state employee, then nothing further need be afforded. No property has been taken without due process. No right secured by the Constitution or laws has been abridged. *Baker v. McCollan, supra.* No basis for an action under § 1983 exists.

* * *

We believe it incumbent upon us to point out here one difficulty we observe with the concept that due process afforded at the state level avoids § 1983 liability. It remains true that the Eleventh Amendment prohibits § 1893 judgments against the states but does not prohibit awards of damages against individual governmental defendants. If the existence of a state administrative remedy (where the state has volunteered to pay) is found to eliminate any jurisdictional basis for § 1983 judgments against individual defendants, how does one justify imposing personal liability upon another defendant, in another state, for exactly the same conduct, simply because his state has not chosen to abrogate its sovereign immunity? This conclusion leaves individual defendants exposed to personal liability under § 1983 in one instance and shielded from liability in another, where the only variable (the state's decision to waive its sovereign immunity) is totally beyond the defendants' control.

Even if one is willing to conclude that the Fourteenth Amendment, as enforced through § 1983, compels the states to abrogate their sovereign immunity or allow their employees to suffer the risk of personal liability under that statute, this places the personal fortunes of individual governmental servants at risk in a conflict between

the state and federal governments which they are powerless to affect.

We believe a more equitable solution can be found. One which would uniformly protect or penalize the acts of state employees based upon the quality of their conduct alone. This can be done by a final resolution of the question of whether negligent conduct creates a basis for liability under § 1983.

II.

The Issue of Negligence.

The next question presented is whether liability may be imposed under § 1983 for negligent conduct. In this case the United States District Court for the District of Nebraska held, and the United States Court of Appeals for the Eighth Circuit summarily affirmed the proposition that, "[N]egligence can form the foundation for an action under Section 1983." (Petition for Certiorari, Appendix B). It is the belief of the petitioners that neither the legislative history of § 1983 nor the rulings of this Court interpreting § 1983 support the proposition adopted by the courts below.

The petitioners believe that in the absence of evidence that they abused their authority as officers of the State of Nebraska's penal system—in the absence of evidence establishing that they intended the loss in question to occur or displayed deliberate indifference to the potential for such loss—that no basis for an award of damages under § 1983 exists.

A. Legislative History.

The legislative history which underlies § 1983 was extensively discussed by this Court in *Monroe v. Pape, supra* (hereinafter *Monroe*). In *Monroe,* this Court concluded that the legislation which created § 1983 had three main purposes. First, to "override certain kinds of state laws" which were violative of the Fourteenth Amendment. *Id.* at 173. Second, to provide "a remedy where state law was inadequate." *Id.* "The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. Section 1983 was enacted against the backdrop of the lawless post civil war activities of the Ku Klux Klan, but it was not at the activities of the Klan that § 1983 was directed. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [§ 1983]." *Id.* at 174-175.

The conscious refusal of state officials to prosecute and bring to justice those persons terrorizing the newly enfranchized and other union supporters created the "momentum" for the passage of § 1983.

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

Cong. Globe, 42d Cong., 1st Sess., App. 374. In context then, the focus of § 1983, as relevant here, was to correct

the *intentional* malfeasance or nonfeasance of state officials during the near anarchy of reconstruction.

It is important here to contrast the evils which gave birth to § 1983 with the facts to which the respondent now seeks to have it applied. Compare the social evil inherent in the conscious willingness of state officials to ignore the murder, rape and mutilization of persons supposedly under their protection with the facts in this case. The petitioners were not willing spectators at the victimization of the respondent's rights. On the contrary, they actively established at the penal institution under their control a procedure to *protect* the respondent's property. The establishment of that system was the *only act* which ultimately brings them before this Court. To claim that the conscious creation of a system to safeguard an inmate's property and the subsequent failure of that system on a single occasion implicates the same type of wrongdoing contemplated by the creators of § 1983 does a disservice not only to the petitioners but to the history of § 1983 itself. As this Court stated in *Paul v. Davis, supra* at 669, "We think it would come as a great surprise to those who drafted and shepherded the adoption of . . . [the Fourteenth] Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

B. The Monroe Decision.

In *Monroe* six negro children and their parents sought an award of damages under § 1983 where they alleged their residence was broken into by thirteen police officers of the City of Chicago. They were taken from their beds

and made to stand naked in their living room while the entire residence was ransacked by the officers. This occurred at night and without either a proper search or arrest warrant. The father was subsequently taken to a police station and held incommunicato for approximately ten hours without any form of legal process. The father was then released without any charges being filed. *Monroe,* supra at 169.

The *Monroe* case was before this Court to determine if the allegations noted above stated a cause of action under § 1983. The claim of the police officers, raised successfully in the lower courts, was that their actions were so far beyond any legal authority they possessed that their actions could not be characterized as having been taken "under color of" state law.

This Court reviewed previous cases in which the meaning of the phrase "under color of" state law had been discussed and defined and attached the same interpretation to that phrase in § 1983 as it had to the same phrase in the criminal sections discussed in *Screws v. United States,* 325 U. S. 91 (1945); *United States v. Classic,* 313 U. S. 299 (1941); and *Williams v. United States,* 341 U. S. 97 (1951). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic, supra* at 326. Thus, it was held in *Monroe*

that the illegality of the officers' actions did not shield them from liability under § 1983.

C. The Monroe Dicta.

Negligent conduct was not at issue in *Monroe*. The actions of the police officers in *Monroe* were clearly intentional. The question of whether negligent conduct can create liability under § 1983 has its birth, however, in a caveat placed in the plurality opinion in *Monroe* by Mr. Justice Douglas. "Section . . . [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe, supra* at 187. The purpose of this language, we believe, was to distinguish the application of § 1983 from the more stringent criminal standard of liability announced in *Screws v. United States, supra.* That case represented a challenge to a federal criminal statute (which was companion civil rights legislation to § 1983) on grounds of vagueness. Mr. Justice Douglas, writing for the plurality, struggled to uphold the statute in question, *Id.* at 94-100, and ultimately saved it from constitutional infirmity by the following interpretation of the word "willfully" contained in the criminal section. "[M]ore is required than the doing of the act proscribed by the statute . . . [Citations omitted] An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." *Screws v. United States, supra* at 101. The term "willfully," Mr. Justice Douglas noted, "connote[s] *more* than an act which is voluntary and intentional." *Id.* at 101. (Emphasis added.)

The purpose of the often quoted dicta from *Monroe* was not to create the "font of tort law" discussed in *Paul*

v. Davis, supra at 701, but to point out that § 1983 did not require proof of the additional element of "evil motive" deemed necessary for conviction under the criminal civil rights sections. *Monroe* cannot be read to say that proof an act was "voluntary or intentional" is not essential to liability under § 1983.

In this light, § 1983 should only be read against the background of tort liability that makes a man responsible for the natural consequences of his *intentional,* not negligent, acts. Such an interpretation is consistent with rulings by this Court subsequent to the *Monroe* decision.

D. The Concept that Negligent Conduct does not Create a Basis for Liability under § 1983 is Consistent with Previous Rulings of this Court.

Recent rulings of this Court have consistently allowed to stand lower court decisions which refused to allow recovery against governmental defendants under § 1983 based upon theories of negligence, and, in those cases in which lower courts had imposed liability under § 1983 for negligent conduct, this court has consistently resolved such cases so as to ultimately absolve the governmental defendants of liability.

1. Estelle v. Gamble

In *Estelle v. Gamble,* 429 U. S. 97 (1976), this Court considered the level of culpability necessary to create liability under § 1983 in an Eighth Amendment—medical treatment—context. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does

not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106.

If the ruling of the Circuit Court in the petitioner's case is allowed to stand, a prisoner's property will be afforded greater protection than his health by § 1983 and the Fourteenth Amendment. We believe the standard announced in *Estelle v. Gamble, Id.*, correctly balances constitutional requirements, common law negligence and the realities of life in a penal institution. This case does not.

Section 1983 had as its purpose, penalizing abuses of governmental power in an attempt to coerce proper conduct by state officials. Section 1983 cannot, by coercion, prevent simple negligence. By making negligence actionable under § 1983 this Court would only impose an additional burden upon the federal court system. Any manner of state neglect, *e. g.*, auto accidents, personal injuries, road repair, could then be litigated in federal court under § 1983. *Paul v. Davis, supra,* at 698-699.

2. Negligence Cases Where Liability Was Rejected by this Court.

In *Procunier v. Navarette,* 434 U. S. 555 (1978); and *Baker v. McCollan,* 443 U. S. 137 (1979), this Court accepted cases in which the lower courts had imposed liability under § 1983 for negligent conduct. In both cases, although the negligence question was not taken up, the governmental defendants were absolved from liability, and

two attempts to impose liability under § 1983 on a negligence theory failed.

In *Procunier v. Navarette, supra,* plaintiffs had successfully sought in the courts below to impose liability under § 1983 upon state prison officials for the defendants' negligent failure to forward plaintiffs' mail. This Court declined to resolve the negligence question, but held that prison officials were entitled to the qualified immunity described in *Scheuer v. Rhodes,* 416 U. S. 232 (1974); and *Wood v. Strickland,* 420 U. S. 308 (1975), if their actions could not reasonably have been known at the time they were taken to have been in violation of the inmate's clearly defined constitutional rights, and the defendants were absolved of liability under that immunity.

In doing so the Court discussed the level or type of intent which must be established by a plaintiff to defeat *Wood v. Strickland, supra,* immunity.

> The prison officers were charged with negligent and inadvertent interference with the mail and the supervisory personnel with negligent failure to provide proper training. To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.

Procunier v. Navarette, supra at 566.

In *Baker v. McCollan, supra,* this Court again had before it the negligence question. The plaintiff had been erroneously incarcerated by the defendant police officers and held for several days due to their negligent failure to verify the plaintiff's identity. The lower court had granted the plaintiff relief under § 1983. In this case the Court

determined the negligence question need not be reached due to the fact that the plaintiff had failed to establish a violation of a constitutionally-protected right.

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," Estelle v. Gamble, 429 U. S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Id. at 146. Other comments of the Court which lend further support to the conclusion that negligence does not create a basis for liability under § 1983 are very appropriate to the facts in this case.

> [T]he reckless failure of a police official to stop a pattern of clearly unconstitutional conduct by his subordinates could be enjoined under § 1983, here there is no indication that petitioner was aware, or should have been aware, either of the likelihood of . . . [the alleged misconduct] or of his subordinates' action in this case.

Id. at 148. Blackmun, J., concurring.

Here there is no showing the petitioners were aware of the respondent's loss or of any unusual risk posed to his property. The petitioners had established an adequate system to protect the property of inmates and, through no intervention of their own, that system failed. Mr. Justice Stevens, in *Baker v. McCollan, supra,* seemed to indicate that an occasional failure of an adequate system need not create liability for its operators under § 1983. "Certainly,

occasional mistakes may be made by conscientious police officers operating under the strictest procedures." *Id.* at 155 (Stevens, J., dissenting.)

In *Martinez v. California,* 444 U. S. 277 (1980), this Court rejected the claim that a state parole officer was liable under § 1983 for the death of a person at the hands of a parolee. The plaintiffs alleged the release of the parolee was negligent. This case was, again, decided on the basis that no constitutionally-protected right had been abridged. However, the Court stated, "Although a § 1983 claim has been described as 'a species of tort liability,' . . . [citation omitted], it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." *Id.* at 285.

These comments echo the concerns expressed in *Paul v. Davis, supra,* that § 1983 was not intended and should not be allowed to become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 424 U. S. 701. In that case the plaintiff claimed governmental defendants had defamed him.

One must bear in mind that of all the actions taken with respect to inmates daily by prison administrators there are few, if any, which do not touch upon constitutionally-protected rights and are made under color of state law. In *Bell v. Wolfish,* 441 U. S. 520 (1979), this Court recognized the need to allow prison administrators freedom to perform their duties without undue interference by the federal courts. If the negligence of prison personnel becomes the legitimate object of § 1983 litigation, it is difficult to estimate the magnitude of the increase in liti-

gation which such a determination would produce, or its effect upon state prison administrators.

3. Cases Rejecting Negligence as a Basis of Liability Allowed to Stand.

This Court has consistently allowed to stand decisions of the Circuit Courts of Appeals that negligent conduct cannot form the basis of liability under § 1983.

In *Bonner v. Coughlin, supra,* note 1, this court was faced with almost exactly the same facts presented here. An inmate's personal property had been lost due to the alleged negligence of state prison personnel. However, in that case the Circuit Court denied the inmate relief under § 1983 on a negligence theory.

> *Monroe v. Pape, supra,* also carefully traced the legislative history of Section 1983. Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under Section 1983 might deter similar misconduct. On the other hand, extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the federal courts would be inundated with state tort cases in the absence of Congressional intent to widen federal jurisdiction so drastically.[2]

Id. at 545.

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2 For list of decisions referred to see, *Id.* at 545 n. 8.

The only distinguishing feature we can discern between *Bonner v. Coughlin, Id.* and the present case is that in the present case there exists even *less* evidence of negligence (if negligence is established at all).

In *Bogard v. Cook,* 586 F. 2d 399 (5th Cir. 1978), *cert. denied* 444 U. S. 833, a prisoner had suffered various and severe injuries while an inmate of a state penal institution. In that case the Circuit Court specifically discussed this Court's ruling in *Procunier v. Navarette, supra,* and stated:

> *Wood* [*v. Strickland, supra*] did not definitely establish the extent to which conduct less egregious than an affirmative intent to harm—simple negligence, gross negligence or recklessness—would satisfy the subjective 'malicious intent' requirement. *Navarette* appears to fill in that deficiency. The holding in *Navarette* squarely establishes that proof of simple negligence is not enough to pierce an official's immunity under § 1983.

Bogard v. Cook, supra at 411. The Circuit Court then concluded:

> In light of the Court's reference to the Restatement, we read the malicious intent prong of the official immunity defense to require proof that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result. The spirit of the rule reaches nonfeasance as well as misfeasance. It does not insulate an official who, although not possessed of any actual malice or intent to harm, is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inaction. At the same time, however, the test requires that a plaintiff show that the official's action, although labeled

> as "reckless" or "grossly negligent," falls on the actual intent side of those terms, rather than on the side of simple negligence.

Id. at 412. In view of that conclusion the plaintiff was denied recovery under § 1983. This Court declined to consider the case further.

Thus, on several recent occasions this Court accepted consideration of cases in which negligence was at issue and governmental defendants had been held liable. On each occasion the negligent conduct alleged was found ultimately *not* to create liability under § 1983. In cases in which the courts below had rejected the concept of § 1983 liability based upon allegations of negligence, however, those decisions were allowed to stand.

E. Creating Liability Under § 1983 for Negligent Conduct is Inconsistent with a Qualified Immunity.

1. The Qualified Immunity.

"A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier v. Navarette, supra* at 569, Stevens, J., dissenting.

In *Scheuer v. Rhodes, supra,* this Court announced that officers of the executive branch of government were entitled to a qualified immunity or "good faith" defense to liability under § 1983. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive

officers for acts performed in the course of official conduct." *Id.* at 247-248.

In *Wood v. Strickland, supra,* the details of that immunity were further defined.

> [W]e hold that a . . . [§ 1983 defendant] is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the . . . [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Id. at 322. In *Procunier v. Navarette, supra,* this qualified immunity was specifically made applicable to officers of a state penal system.

It is our belief that the existence of the qualified immunity mitigates strongly against the expansion of § 1983 into areas of negligent conduct. *See, Bogard v. Cook, supra.*

In *Scheuer v. Rhodes, supra,* the action in question was the intentional shooting of students by National Guardsmen. *Wood v. Strickland, supra,* involved the expulsion of two students from school. In both instances conscious decisions were made and actions taken by the governmental defendants. In both instances, the defendants were found entitled to a qualified immunity which hinged upon their state of mind at the time the decision in question was made.

Here the petitioners made no decision and took no action except to protect inmate property. The petitioners established a system to care for the property of the in-

mates under their supervision and without their knowledge that system failed in this single instance. The petitioners made no decision to take the respondent's property, nor did they refuse to take action to protect it. The situation as perceived by the petitioners at the time required no action, no decision. In the absence of a situation calling for a decision, how can a defendant in a § 1983 action form the thoughts necessary to evaluate his entitlement to a qualified immunity?

It must be concluded either that § 1983 defendants will now be held responsible for negligent conduct when intentional but mistaken conduct would shield them from liability under the qualified immunity, or that unintentional conduct simply does not state a cause of action under § 1983. Equity urges the latter conclusion.

2. The Public Policy.

The public policy which underlies the qualified immunity would be done an ultimate disservice if liability were upheld in this case.

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

Wood v. Strickland, Id. at 319-320. If this Court found such reasoning compelling in a case involving public school

administration, imagine the enhanced weight such logic brings to bear upon a penal system employee. In penal situations conceivably *every* act is taken under color of state law, and *every* act bears to one degree or another upon the constitutional rights of those confined.

We will not achieve the quality penal systems in this country we all desire if conscientious penal administrators must fear the imposition of damages, costs and attorneys fees every time a property loss is suffered by an inmate. For if the logic of the district court is carried to its logical extreme, *every* loss which occurs within a penal institution could arguably be attributed to negligent supervision of subordinate staff. The concerns of the minority in *Wood v. Strickland, supra,* seem even more appropriate when applied to the less desirable but equally essential business of penal administration. "[O]ne must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education." *Id.* at 331, Powell, J., dissenting.

F. Application of the Law to this Case.

Against this backdrop the rulings of the lower courts in this case should not be allowed to stand. The district court held the petitioners liable for allegedly negligent conduct under § 1983 when neither logic nor the statute mandate that result. Furthermore, the district court concluded that the petitioners knew or should have known that their alleged negligence would violate the respondent's constitutionally-protected rights. In order to be denied the qualified immunity made applicable to the petitioners by *Procunier v. Navarette, supra,* it must be

shown that the constitutional right alleged to have been violated was "clearly established." The constitutional right the respondent relies upon is the right to be free from the negligent deprivation of his property by state agents. How can it be said that right is clearly established in view of the cases discussed above? We do not believe the alleged constitutional right exists. Even if it does exist, it has yet to be clearly established, and the petitioners should not be penalized for not perceiving it.

III.

The Record in This Case does not Establish that the Petitioners were Negligent.

1.

The discovery documents (J. A. 13 and 16) and the stipulation (Petition for Certiorari, Appendix A) show only the existence and operation of the system, the very general responsibility of the petitioners for that system, the properly documented reception of the respondent's property at NPCC and the property's subsequent loss.

It is important to note what the record before the district court does *not* show. It does not show any personal involvement of the petitioners in the loss of the property in question. It does not show that the property handling system at NPCC was inadequate or had not generally performed the function of protecting the inmates' property. It indicates no knowledge on the part of the petitioners that the respondent's property faced an unreasonable risk of loss, or that the property was, in fact, subject to an unreasonable risk of loss.

2.

The final question is whether the record in this case establishes that the petitioners' actions in this case could properly be found to be negligent.

> Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of or interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

Restatement of the Law (Second), *Torts* 2d, § 289. In this case the lower courts held the petitioners liable under § 1983 for what they perceived as negligent conduct. But what was that conduct? The district court stated: "The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor." (J.A. 8, Petition for Certiorari, Appendix B).

First, it is clear that the petitioners did not personally fail to follow institutional mail procedures. If in fact those procedures were not complied with, it was by lower level employees of the institutional hobby center.

In what manner, then, did the petitioners abridge a duty to the respondent? Their only action was to establish a system for incoming mail to protect an inmate's property; in fact, seeking to avoid a perceived risk of loss. Surely that action was reasonable.

> [T]he care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as neces-

> sary to prevent the act from creating an unreasonable risk of harm to another.

Restatement of the Law, supra, § 298. The record reflects no knowledge on the part of the petitioners that the system they had created represented a risk to the respondent's property or that the system was not functioning properly.

The district court in essence concluded that once having established a system to protect inmate property, the petitioners were on notice that should that system fail they would be automatically liable for the loss. This conclusion ignores both reality and standard conceptions of the law of torts. "Certainly, occasional mistakes may be made by conscientious . . . officers operating under the strictest procedures." *Baker v. McCollan, supra* at 155, Stevens, J., dissenting. "Obviously, no procedures the defendants might have employed would have provided an absolute guarantee against excessive and illegal acts such as pilfering by subordinates. But the Constitution does not require that of them." *Thorton v. Redman,* 435 F. Supp. 876, 881 (D. Del. 1977).

The rulings of the courts below mandate that the petitioners function as *insurers* of the property of the inmates in their charge. That ruling is inappropriate as a tort concept. It is unacceptable as a basis for liability under § 1983.

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CONCLUSION

The lower courts have, in this case, attempted to create a basis for liability under § 1983 which is not consistent with the rulings of this Court, the rulings of their sister courts, or the public policy which underlies § 1983. The most predictable results of upholding this new basis for § 1983 liability will be a marked increase in the number of prisoner lawsuits filed in the federal courts, a marked increase in the amount of time and money the federal judiciary will expend contending with these new filings, and a marked decrease in the morale of those persons conscientiously attempting to perform the thankless but essential task of maintaining and administering our states' penal systems. Funds from finite state corrections budgets will be drained from projects to upgrade institutional facilities and personnel and of necessity be dedicated to the continual litigation and occasional payment of minor inmate claims in the federal courts. All this will occur while completely adequate state remedies suffer a decline in use.

What attorney, presented with a simple negligence claim by a state prisoner, would elect to process that claim through a state claims system for little or no fee when he could be entitled to a comparatively handsome attorney's fee if the same case was successfully filed in federal court under § 1983? The processing of simple tort claims through the federal courts could prove quite lucrative to enterprising counsel. This fact, plus the state prisoners' natural inclination towards the federal courts, will bring ever increasing numbers of these minor claims to the

federal judiciary's doorstep while other litigants with much more substantive claims wait their turn.

In essence, no one would benefit from the rule here urged by the respondent, and many would be burdened. The prisoner has his remedy in the state administrative procedures and tort law. The federal courts, frankly, have better things to do with their time.

"At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976).

We can conceive of no circumstance in which purely negligent conduct need state a claim under § 1983 and we urge this Court to so hold. However, we are aware of this Court's desire to carefully consider each situation as it arises.

> [T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.
>
> *Baker v. McCollan, supra* at 139-140

Therefore, we would urge this Court, if deemed necessary simply to rule that at least insofar as property loss under the Fifth and Fourteenth Amendments is con-

cerned, simple negligence does not give rise to a claim under § 1983, and reverse the decision below.

Respectfully submitted,

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